No. 15,212

IN THE

United States Court of Appeals

For the Ninth Circuit

MIKE ERCEG,
Appellant,

vs.

FAIRBANKS SCHOOL DISTRICT, et al.,
Appellees.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLANT.

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I.

JURISDICTIONAL STATEMENT.

This is an appeal from an Order of the District Court for the District of Alaska, Fourth Division, entered May 29, 1956, dismissing plaintiff's complaint. The order appealed from was a final decision by the Court below and as such may be appealed to this Court under the provisions of Title 28, USCA, Section 1291.

II.

STATEMENT OF THE CASE.

That for many years prior to 1949, appellant was the owner of the patented, undeveloped mining claims

described in plaintiff's complaint. These claims had been patented by appellant in 1928 or thereabouts. That he had held said claims as unpatented placer mining claims from 1908 to the year of patent.

That Federal Law (Title 48, Section 78, USCA) provided that the tax which may be levied upon patented undeveloped placer mining claims was according to the price paid the United States for the same by the owner. The price to be paid by the owner under the provisions of Section 37, Title 30, USCA and Section 47-3-84 ACLA, 1949, for such mineral claims was and still is $2.50 per acre, which would make the valuation of said claims as $50.00. One per cent (1%) tax would therefore be fifty cents (.50) per claim of twenty acres.

On June 3, 1948 the Organic Act for Alaska was amended to allow the Legislature of the Territory of Alaska to establish a flat rate for taxation of various types of mining claims including patented non-producing placer claims. Appellant's claims were all of this class.

By Chapter 10, Session Laws of Alaska, 1949, the maximum valuation which could be placed on patented, non-producing claims was $500.00 for each 20 acres or fraction thereof.

The appellee herein is an independent school district with power of taxation of appellant's claims subject to the limitations prescribed by the laws of the United States and the Territory of Alaska.

That in 1949 the appellee School District's Tax Assessor assessed the valuation of appellant's claims as

$28,960.00, and levied a tax of $289.60 against said claims, which was approximately $20.00 for each 20 acres.

That in June, 1953, the appellee offered for sale those claims shown in the tax roll as Pat. No. 1011214, 4-5-6 Below 1st Tier, Left Limit, 65.5 acres and sold said claims to one E. M. Hufford for $393.13.

That following said sale the appellant did pay to the appellee the sum of $1057.87 which payment was made under protest by appellant.

That on June 22, 1954, the appellee did sell at public sale the said claims, excepting the 65.5 acres previously sold to E. M. Hufford, and the same were sold to the parties set forth at pages 7 and 8 of the transcript of record.

That on the 17th day of June, 1955, appellant tendered payment for redemption of the claims sold on June 22, 1954, which check was in the sum of $707.25, and was made under protest. Said check was refused and appellant was informed that $2,-034.67 was the sum necessary to redeem said claims. Appellant was informed that of said amount $953.60 was taxes; $517.28 interest; $484.73 was legal fees and advertising; $79.16 was penalties. That the entire holdings of appellant had been assessed at $100.00 per acre.

That the appellee had placed an unlawful fictitious value on said claims which were confiscatory, capricious and arbitrary. That the assessment of real property by the assessor was as follows:

Real property, other than mining claims, was assessed at 75% of its full and true value.

Unpatented lode claims assessed at $50.00 per acre.

Patented lode claims assessed at $250.00 per acre.

Unpatented placer claims assessed at $25.00 per acre.

Patented placer claims assessed at $100.00 per acre.

Tax was levied upon 100% of said fictitious and unlawful valuation.

To appellant's complaint, defendants, Fairbanks School District, D. H. Dexey and E. M. Hufford, filed a Motion to dismiss the action, supported by a brief in support of such Motion.

The District Court granted said Motion and dismissed the action.

III.

SPECIFICATION OF ERROR.

1. That the Court erred in sustaining defendants' Motion to dismiss action.

2. That the Order Dismissing the action was contrary to law.

IV.

ARGUMENT OF THE CASE.

It is respectfully represented that appellee's contention that appellant did not comply with the provisions of Section 16-1-24 ACLA 1949 is not well taken. It is believed that the said statutory provision is applicable to the case at bar.

In the present instance the value of the claims was established by law, the Congress of the United States having fixed the value of non-producing patented claims at $2.50 per acre or $50.00 for a 20-acre claim. In 1948, the Legislature of Alaska, was, by an amendment to the Organic Act, allowed to place a flat valuation on mining claims for the purpose of taxation.

In 1949, the Legislature in enacting a general property tax, placed a valuation of $500.00 on non-producing patented claims, which, with a 1% tax rate, would result in a tax of $5.00.

In the first instance there must be a legal assessment before there can be a lawful collection of a tax.

Halferty v. Kansas City P & L Co., 145 S.W. (2d) 116;

Fumulty v. District Court, 102 Fed. (2d) 254.

It is contended that the assessment was fraudulent and arbitrary and was violative of Federal and Territorial laws, and being so would not come under the provisions of Section 16-1-124 and 16-1-131, ACLA 1949. An assessment and tax in contravention of the amount set by statute would be illegal *ab initio.*

Appellee's contentions are predicated upon an "absence of fraudulent or arbitrary conclusion on the part of the assessing officers." As we have pointed out, there were fraudulent and arbitrary conclusions on the part of the taxing and assessing officers. A total disregard of the prevailing statutes would certainly constitute arbitrary and fraudulent conclusions.

The appellant called this illegality to the attention of the taxing authorities when he paid $1057.00 under protest.

It is difficult to follow appellee's reasoning regarding the applicability of Section 16-1-131, ACLA 1949, to the case at issue. The law in force at the time of the assessment provided that $5.00 per claim was the maximum tax on mining claims such as described in the complaint. Appellant had 14 claims, and the maximum tax would have been $70.00, but in 1953 he paid to the appellee the sum of $1057.00.

How could he comply with Section 16-1-131, when he had greatly overpaid the school district. Where the greatest tax to which he could be subjected for the years in question was $140.00, he paid $1057.00. He had or should have had a large credit balance on the books of the appellee, School District.

There certainly was no "absence of fraudulent and arbitrary assessment" by the assessing officer.

> It is held that all proceedings prescribed by law for the assessment of land for the purpose of taxation must be substantially, if not strictly complied with, and the rules applicable to assess-

ments have been required to be strictly construed in favor of the land owner.

Wasden v. Toeli, 117 Pac. (2d) 465;
Title and Guarantee Co. v. Allen, 256 N.Y.S. 400.

Assessment has been on the valuation in the manner prescribed by law.

Republic Ins. Co. v. Highland Park, 57 S.W. (2d) 627;
McCracken v. McFadden, 122 S.W. (2d) 761;
North Co. v. Phila. Coal Co. 131 Fed. (2d) 562.

In the case at bar the assessment of mining claims was taken from the assessing officers of the school board and established by law. When the Federal government and the Legislature determine the mode and manner in which different forms of property may be valued for taxation, the method described by them must be followed.

Parsons v. Detroit, 15 Fed. Supp. 986;
Denver v. Lewin, 105 Pac. (2d) 854;
Flynn Estate v. Board, 286 N.W. 483;
Evanson v. Pollville, 3 N.W. (2d) 650;
Anderson v. Park R., 72 N.E. (2d) 210;
Washington v. Wiley, 31 Pac. (2d) 539;
New York R.R. v. Martin, 85 Law. Ed. 1527;
People v. Edison, 32 N.E. (2d) 902;
Dallas Co. v. Dallas Bank, 179 S.W. (2d) 288;
Helin v. Grosse Pt., 45 N.W. (2d) 338.

Where a case is within a constitutional or statutory provision so declaring the surface of mineral land

purchased from the Federal Goevrnment is to be valued at the price paid the government. Under some organic provisions, valuation of unpatented or non-producing patented mining claims may or should be a flat rate.

Hess v. Mullaney, 91 Fed. Supp. 139;
Mullaney v. Hess, 189 Fed. (2d) 417;
Superior Coal v. Mendenhall, 41 Pac. (2d) 14;
Shell v. Morris, 11 Pac. (2d) 774.

The aggrieved has the right of action for illegal taxes.

86 Fed. (2d) 633;
196 Atlantic 656;
Ogder v. Armstrong, 168 U.S. 224, 42 L.Ed. 444;
Moore v. Rose, 77 L.Ed. 1265;
Ward v. Leve Co., 64 L.Ed. 759;
Union Pacific v. Dodge Co., 25 L.Ed. 196;
Swift v. U. S., 28 L.Ed. 341;
Stanley v. Albany Co., 30 L.Ed. 1000;
Chesborough v. U. S., 48 L.Ed. 432;
Pierce v. Green, 131 A.L.R. 335;
Sioux City Bridge v. Dakota, 67 L.Ed. 340, 28 A.L.R. 979.

Appellant finds no basis upon which appellee predicates his statement "Assessors may take into consideration the fact that it contains undeveloped minerals in such quantity as to enhance the value of the land over its mere surface value".

They shut their eyes to the fact that the Congress of the United States and the Legislature of Alaska

has withheld from taxing districts, the power to assess the value of mining claims.

Appellee also states that Section 98, Title 48 USCA is simply a permissive statute. They did not mention that the Legislature has limited the assessment of valuation for taxation purposes. Do they contend that the Territorial Act is simply permissive?

Appellant contends that both the Federal and Territorial Acts impose an absolute limitation on assessment of mining claims of the class owned by appellant.

> "Where the public interest or private right requires that a thing be done, permissive language is generally construed as being mandatory."
>
> *Mullaney v. Hess,* 189 Fed. (2d) 417;
> *Hayes v. Los Angeles,* 33 Pac. 766;
> *Steward Co. v. Alameda,* 76 Pac. 481;
> *Malone v. Van Etten,* 178 Pac. (2d) 382;
> *Crawley v. Board,* 200 Pac. (2d) 107.

Property cannot be taxed beyond its value.

Rogers v. Pike Co., 157 S.W. (2d) 346.

In this case the valuation of mining claims has been set by law. To exceed this legal valuation for taxation constituted an arbitrary, fraudulent and illegal assessment.

Being an illegal assessment the case does not fall within the framework of Sections 16-1-124 and 131, ACLA 1949.

In the present instance the illegal, arbitrary and fraudulent assessment has led to confiscation. The appellant has lost the mining claims he has held since 1908.

He protested the illegality of the assessment with his payment of $1057.00 in 1953, but his protest went unheeded.

The Fairbanks School District illegally assessed unlawful taxes against appellant, and now comes into Court and says that because he does not tender more money into Court, he shall be deprived of his remedy and of his property.

Appellee, in his brief in support of his motion to dismiss touched upon presumptions in favor of tax being correct; that the good faith of tax assessors and the validity of their acts are presumed; that the burden of proving that the tax is excessive is on the taxpayer, but in no instance does the defendant touch upon the remedy available to the taxpayer when the assessment and levy are, without doubt, illegal.

When a taxpayer proves that the assessment of a tax is illegal, as in this case, he can bring suit to recover his property and excess taxes paid.

To hold otherwise would be tantamount to rewarding the taxing power for doing an illegal act.

In this case an old man, holding claims since 1908, is being deprived of his claims by the illegal act of the assessor. The appellant did what he could to prevent the illegality by paying under protest the sum of $1057.00 in 1953 and further tendering his check in the sum of $707.00 in 1954 for redemption of claims sold at tax sale in that year. This check was likewise paid under protest.

In 1953, he called the assessor's attention to the illegal assessment but to no avail as the assessor con-

tinued to assess at the rate far in excess of the rate established by statute. Forty-six years of ownership, twenty-eight of which was ownership by patent from the Federal Government, was nullified by an illegal assessment by the School District Assessor.

When appellant received the patent the Federal Government in effect said that he could be taxed only on the valuation based upon what he paid the government for the claims, which was $50.00, with a tax of 50c per year per claim.

V.

CONCLUSION.

From the foregoing statement of facts and the law, appellant contends that the District Court erred in dismissing the said action, and that the said Order of Dismissal should be reversed and the case remanded for trial.

Dated, Fairbanks, Alaska,
November 19, 1956.

Respectfully submitted,
TAYLOR AND TAYLOR,
By WARREN A. TAYLOR,
Attorneys for Appellant.

Service of a copy of the foregoing is hereby acknowledged this 19th day of November, 1956.

MAURICE T. JOHNSON.